

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536

File: WAC 00 257 52232

Office: CALIFORNIA SERVICE CENTER Date:

MAY 16 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition remanded to the director with instructions.

The petitioner is a retail and wholesale restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). The director's decision stated that the priority date was established on "12/10/96" [sic], though the Form ETA 750 proved that the acceptance for processing was on May 22, 2000. The petition's priority date is May 22, 2000. The beneficiary's salary as stated on the labor certification is \$600 per week or \$31,200 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In a request for evidence (RFE) of April 12, 2002, the director required the petitioner's annual reports, audited financial statements, or federal income tax return for 2000 in particular, and quarterly wage reports (Forms DE-6) for the last 12 quarters.

Counsel submitted the petitioner's 2000 and 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation. Respectively, they reported ordinary income from trade or business activities of \$58,282 and \$53,975. Schedule L showed net current assets, the difference of current assets minus current liabilities, being \$109,500 and \$144,745. The response to the RFE, also, offered nine (9) Forms DE-6, but those due July 1 and October 1, 2001 and January 1, 2002 were copies, and the whole covered only six (6) quarters, not the 12 requested in the RFE.

The director identified five (5) Immigrant Petitions for Alien Worker (I-140) from the petitioner, noted the approval of two (2), assumed that each beneficiary might earn \$31,200 per year, and deduced that the reported ordinary income would not support this petition. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel provided two briefs, on appeal. One relates to the instant I-140 (of JSR) and states that:

Basically, the [Bureau, formerly the Service or INS] has denied this case because it concluded that ... [s]ince the [petitioner] cannot afford to add five additional staff, it concludes the [petitioner] cannot add even one new staff member despite the fact that the [petitioner's] tax records would clearly support an additional employee.

The director named two beneficiaries, BBA and CS. Counsel claims that the petitioner is paying BBS the proffered wage as of the priority date, but only one (1) Form DE-6, due January 1, 2002, reports his wages. Conversely, counsel says that CS left the petitioner three (3) years ago, but does not document the alleged termination. As a matter of fact, a CS appears as recently as the Form DE-6 due July 1, 2001. The proceedings lack essential data, in part, because of the petitioner's failure to present Forms DE-6 and pertinent data.

The assertions of counsel do not constitute evidence. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner offers no copy of the withdrawal of the I-140 for YC. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

PS, it is said, was being paid less than the beneficiary's proffered wage, but the prevailing wage, at the priority date of the instant I-140. The issue, on remand, turns on whether the petitioner pays each beneficiary in terms of its own Form ETA 750.

Counsel errs in the belief that the petitioner need not pay the proffered wage if it has paid the prevailing wage, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989). That holding is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The Court held that the Bureau should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. See also, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

On appeal, counsel submits the petitioner's bank account statement, dated June 28, 2002, stating a balance of \$97,621.12 and average tri-monthly balance of \$82,241.57. In an Agreement of Sale and Purchase (acquisition agreement), dated March 15, 2002, the petitioner agrees to pay \$52,000 for a new restaurant business. The acquisition agreement appears to be an account payable or liability, rather than additional funds. Further evidence of assets will be appropriate on remand, but the bank statement and acquisition agreement do not appear to relate to the priority date.

Even though the petitioner submitted its commercial bank's letter as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Evidence includes some personal bank statements, a personal

credit application, and a restaurant review from the Los Angeles Times. Counsel argues that they show the ability to pay with the "employer's personal assets."

The tax return and I-140 at the priority date indicate that the petitioner is a corporation. Contrary to counsel's inference, the Bureau may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel refers to the Complaint for a Writ in the Nature of Mandamus to Compel Administrative Action, filed January 30, 2002 in this matter, in the United States District Court for the Central District of California, Civil No. 02-00899. Its present effect on the I-140 for JSR is unclear.

In view of the foregoing, the decision of the director is withdrawn. The petition is remanded to consider, as of the priority date, the petitioning corporate entity's ability to pay the proffered wage, in terms of the Form ETA 750, its corporate assets and income, its replacement of employees, and its withdrawal, if any, of I-140s. The director may request any additional evidence deemed pertinent, including that of the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review without an additional fee.